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In Re:

Case No. 04-33703

Robert S Tollefson  
and Carole J Tollefson,

Chapter 13 Case

Debtors,

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**RESPONSE BY HEARTLAND CREDIT UNION  
TO TRUSTEE'S OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN**

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TO: and other entities specified in Local Rule 9013-3.

1. Heartland Credit Union, (the "Respondent") is the holder of a claim in the above case, and, by its undersigned attorney, serves and files this response to the Trustee's objection to confirmation of the proposed Chapter 13 Plan.
2. Respondent is the holder of a claim, and is thus a party in interest.
3. The Trustee's sole objection is as to the interest rate used for present value on Respondent's secured claim.
4. Respondent has filed its claim and no objection has been filed to it.
5. The Code clearly provides that secured claims that are paid through deferred time payments must be paid at their present value in accordance with §1325(a)(5)(B)(ii). The plan proposed does provide for an appropriate risk factor adjustment over the prime rate as required by Till.
6. The risk factor was negotiated between Respondent and Debtors without the Trustee's input. The Code does not require the Debtors nor a secured creditor to involve the Trustee in the good faith negotiations on the treatment of a secured claim and the calculation of present value.
7. Respondent objected to the original plan filed by Debtors and specifically objected to the plan on good faith, valuation and disposable income grounds. Respondent and Debtors negotiated an acceptable resolution short of an actual hearing. Debtors filed a modified plan. Respondent

withdrew its objection based on the modified plan.

8. The prime rate at the time of the negotiations was 4.75%, the parties agreed on an appropriate risk factor of about 5.00%. Respondent agreed to accept its contract rate of 9.2% which was lower than the corresponding risk factor rate. The following facts support the risk factor agreed to by the parties:
  - a. This is the third Chapter 13 case filed by the Debtors. First case in 1993 dismissed for failure to make payments. Second case in 1995 completed after many problems trying to stay current on plan payments and on direct payments to the home mortgage lender.
  - b. Debtors have significant ongoing gambling problems. Several claims listed in Schedule F are gambling related. The Statement of Financial Affairs admits to over \$21,000 in gambling losses in the 12 months before filing this case.
  - c. Refusal by the Debtors to trim their expenses in Schedule J to eliminate unnecessary and burdensome debt for cable, pet care and other unnecessary expenses. Corresponding inability to allocate appropriate amounts for maintenance and repair of Respondent's collateral over and above the usual gas costs.
  - d. Debtors are both retired and on fixed incomes. Both Debtors refuse to have plan payments made by a version of wage order through the use of direct deposit or other automatic withdrawal from the bank account where their social security checks are deposited.
  - e. The collateral securing Respondent's debt is depreciating. No payments have been made to Respondent since May 2, 2004. See verification filed by Respondent with objection.
9. It is Respondent's belief the Debtors' primary use of the collateral is for out of town recreation and in particular to provide transport to the casinos. Debtors reside in Woodbury. Their casino of choice seems to be Treasure Island Casino which is too far for taxis. However, they could easily use taxis for necessary local transportation such as groceries, medical care, and local recreation such as movies and dining out. Use of taxis would significantly affect Schedule J, reducing expenses \$338 per month and would restrict the Debtors' ability to participate further in gambling activities. A part of the savings would be needed for the taxi services.
10. All 5 of the listed risk factors are ascertainable from the record in this case. Debtors clearly disclosed the gambling, fixed income, and questionable expense items in their filed petition, schedules and related documents. The 2 prior case filings are easily found by searching the

court's website for other filings under the Debtors' names. Certainly the Trustee should be aware of the 2 prior filings as both were chapter 13 cases in Minnesota.

11. Failure to provide for appropriate present value compensation on deferred payments is grounds for denial of confirmation. See, In re Green, 151 B.R. 501 (Bkrcty.D. Minn. 1993); Resolution Trust Corp. v. Adams, 142 B.R. 331 (E.D.Mo. 1991); and Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir.1990).
12. The majority opinion in Till cited in the Trustee's brief does not anywhere require an evidentiary hearing on risk factor determination if the parties are able to resolve the matter. Nor does Till place a ceiling on the risk factor. The only limit is when the plan should not be confirmed at all because there is too much risk. Other than incorrectly assuming that Till places a copy on the risk factor, the Trustee does nothing to show that the risk factor agreed to by the Debtors and Creditor is inappropriate in this case.
13. The Till court does discuss who bears the burden of rebutting the presumptive rate if an evidentiary hearing becomes necessary due to the inability of parties and their counsel to negotiate in a fair and reasonable manner. After identifying four factors that were relevant on the issue of risk, the court concluded "In our view, any information debtors have about any of these factors is likely to be included in their bankruptcy filings, while the remaining information will be far more accessible to creditors...." Till v. SCS Credit Corp., 124 S.Ct. 1951, 1964 (2004).  
Placing the evidentiary burden on the more knowledgeable party, the creditor, does not constitute a requirement for an evidentiary hearing on every chapter 13 case with a risk factor.
14. In fact, the Trustee obviously agrees that there will be a risk factor added to the prime rate in nearly every chapter 13 case. In the usual run of the mill case, perhaps a maximum risk factor of 3% is appropriate. Just the repeat filings and gambling alone puts this case outside of a run of the mill chapter 13 category.

**WHEREFORE**, Heartland Credit Union requests the court overrule the Trustee's objection and

confirm the the proposed plan with 9.2% interest on Respondent's secured claim.

Dated: October 11, 2004

**STEWART, ZLIMEN & JUNGERS, LTD.**

/e/ Linda Jeanne Jungers

Linda Jeanne Jungers, Atty ID #5303X

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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**UNSWORN DECLARATION OF PROOF OF SERVICE**

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I, Linda Jeanne Jungers, declare under penalty of perjury that on October 11, 2004, I served copies of the foregoing Response by Heartland Credit Union, Unsworn Declaration of Proof of Service, and proposed Order, to each entity named below in the manner so stated:

By Facsimile Transmission only to the number shown:

HOGLUND CHWIALKOWSKI & GREEMAN  
Attn: Robert J Hoglund  
Fax: 651-628-9377

Jasmine Z. Keller  
Chapter 13 Trustee  
Fax: 612-338-4529

U.S. Trustee  
Fax: 612-664-5516

Executed on: October 11, 2004

Signed: /s/Linda Jeanne Jungers  
Linda Jeanne Jungers  
STEWART, ZLIMEN & JUNGERS  
430 Oak Grove Street, #200  
Minneapolis, MN 55403

04-02810-0

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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Chapter 13 Case

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**ORDER OVERRULING THE OBJECTION TO CONFIRMATION  
AND CONFIRMING THE CHAPTER 13 PLAN**

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This Chapter 13 case came on before the Court on October 14, 2004 at 10:30 AM, for hearing on confirmation of a proposed Plan of individual debt adjustment. Appearances were as noted in the record. Upon the record made at the hearing, and the other files, records, and proceedings in this case,

**IT IS HEREBY ORDERED:**

1. Trustee's Objection to Confirmation is overruled.
2. Debtor's Plan dated August 20, 2004 is confirmed.

Dated:

**BY THE COURT:**

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United States Bankruptcy Judge